**EDITOR'S NOTE: Reconsideration granted -- reversed See Florence La Rosa, 136 IBLA 373 (Nov. 5, 1996).**

FLORENCE LA ROSE

IBLA 94-368 Decided May 7, 1996

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-43475.

Reversed in part; set aside in part; referred to hearing.

1. Alaska: Native Allotments

A Native allotment application that was rejected by BLM because the applicant was a member of a class bound by a settlement agreement reached in Fanny Barr v. United States is reversed when the record shows the applicant did not qualify as a class member; further, the matter is referred to hearing because the applicant raises questions of fact about whether her allotment application was pending before the Department on Dec. 18, 1971, so as to require that it be adjudicated.

APPEARANCES: Florence La Rose, pro se; Joseph D. Darnell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management,

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Florence La Rose has appealed fran a February 11, 1993, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting Native allotment application AA-43475. Her application was rejected because the land she sought had been conveyed to the State and the State refused to convey it back to the United States, although BIM requested that it do so.

Ordinarily, if an application under the Alaska Native Allotment Act, as amended, was not pending before the Department on December 18, 1971, BLM lacks authority to grant it. See 43 U.S.C. §§ 270-1 to 270-3 (1970), repealed with a savings provision by 43 U.S.C. § 1617 (1994); Mitchell Allen, 117 IBIA 330, 336 (1991). The BLM decision here under review found however, that while La Rose's Native allotment application was not filed until 1981 it was timely because she was a member of the class established by Fanny Barr v. United States, Civil No. A76-160 (D. Alaska 1982).

The Fanny Barr litigation arose from a failure by an organization known as RuralCAP to forward to the Government Native allotment applications collected prior to expiration of the Native Allotment Act in 1971.

A plaintiff class was certified that comprised "all persons who had submitted allotment applications to RuralCAP prior to the statutory deadline but whose application was not forwarded to the Interior Department" (Stipulation of Settlement at 1). As part of the negotiated settlement, class members signed Consent to Adjudication and Limited Waiver (consent form). Therein, class members agreed to be bound by any final decision on their applications and that, while the United States might request voluntary reconveyance of land previously conveyed, if a landowner refused to voluntarily reconvey, the Native allotment application would be rejected and the United States need not initiate a suit to cancel the conveyance, nor would a hearing be held to determine the validity of the Native allotment application.

The land La Rose applied for was selected by the State of Alaska and tentatively approved for conveyance on May 31, 1967. The State refused to voluntarily reconvey the land, and in accordance with the Fanny Barr settlement, BLM rejected the La Rose application. The consent form La Rose signed on March 14, 1984, stated that she agreed to be bound by "any final decision" if she were determined to be a member of the plaintiff class in Fanny Barr. She now, however, insists that even though she signed the consent form, she did not qualify as a class member, and that employees of Alaska Legal Services have advised her she is not a member of the certified class. To became a Fanny Barr class member, a Native must have filed a Native allotment application with RuralCAP before December 18, 1971, that was not thereafter timely delivered to the United States Government. La Rose states that she never filed an application with RuralCAP and therefore did not qualify as a class member, and is not bound by the terms of the settlement. BLM responds that her failure to timely object to inclusion in the class meant she was properly treated as a Fanny Barr class member. In addition to a copy of her consent form in the case file there also appears a copy of a publication of La Rose's allotment claim on November 1, 1984, listing her as a Fanny Barr class member, and an April 22, 1985, State protest of her application which, pursuant to 43 U.S.C. § 1634(a)(5)(B)
(1994), prevented legislative approval of her claim; on July 26, 1989, La Rose was notified by BLM that she had been accepted into the Fanny Barr class.

[1] If La Rose were a Fanny Barr class member, the refusal of the State to reconvey the land would end the matter as far as BLM is concerned, because the consent form waived any right to compel the United States to seek recovery of land conveyed to the State. BLM does not dispute La Rose's assertion that she commenced use and occupancy of the land in question in June 1965, and that therefore her use and occupancy took place prior to State selection application A-062969; a BLM field report based on a field examination of the land claimed concluded that her application should be approved and action taken to recover title. Nonetheless, BLM now asserts that the land was tentatively approved for conveyance to the State on May 31, 1967, and that because La Rose's application was not filed until June 1, 1981, it was not excluded from the State selection. It is argued that her membership in the Fanny Barr class relieved BLM of any duty except to request voluntary reconveyance of that land, which was done.

In order to resolve the question of La Rose's membership in the Fanny Barr class the Board issued an order to the parties on February 20, 1996, to supplement the record on the issue of her membership in the class. The parties were given 30 days in which to furnish copies of any court orders or other documents purporting to certify La Rose as a member of the class or that would explain when and how she became a member of that class and whether any action was ever taken on her consent form dated March 14, 1984. Both parties filed a response.

BLM provided copies of stipulations and orders implementing the settlement of the Fanny Barr case, including a stipulation of settlement, judgment, a court order directing notice of proposed settlement, and a stipulation regarding procedures for determination of class eligibility. These documents set forth the criteria to become a class member and a plain English explanation of what the settlement entailed. The August 20, 1982, court order directing notice of the proposed settlement refers to Exhibit A as a "list of persons whom counsel for plaintiffs have represented to the Court to be definitively identified as class members." BLM, however, states that it was unable to locate that exhibit.

La Rose has submitted documents including an August 21, 1985, letter to her from Alaska Legal Services Corporation (ALSC) which informed her
that she did not qualify as a member of the Fanny Barr class because she had not filed her allotment application with a RuralCAP worker, but had sent it herself. Therefore, the letter states, her name had to be withdrawn from the class and BLM would not process her application. The letter from ALSC also enclosed an affidavit for La Rose to sign that would withdraw her from the class because she had not filed with RuralCAP. There is no evidence that La Rose signed the affidavit, nor does La Rose indicate that she ever signed the affidavit. Indeed, the letter states that in the past she had refused to sign an affidavit withdrawing from the Fanny Barr class. However, the ALSC letter warned her that even if she did not sign the affidavit, if ALSC did not hear from her it would consider the information to be correct and her name would be removed from the Fanny Barr List. La Rose has also submitted a copy of a March 11, 1994, letter to her from ALSC attorney Mary Anne Kenworthy summarizing a meeting the two had on March 10. This letter states that neither the State of Alaska nor BLM challenged her eligibility to be a member of the Fanny Barr class, which they were required to do under paragraph 4 of the stipulated procedures in the case, and since she had not voluntarily withdrawn from the class she became a class member. Nonetheless, the Kenworthy letter also explains that, even though BLM had treated La Rose as a class member, it appeared that she did not meet all the requirements for class membership.

The record therefore shows that while BLM treated La Rose as a Fanny Barr class member she was not eligible to be included in the class. Although she took steps aimed at becoming a class member, La Rose insists that she did not qualify as a class member because she did not file her application with RuralCAP; she has submitted proof that ALSC was acting to remove her from the class. Moreover, BLM has been unable to supply any documentation that La Rose was accepted by the Court as a class member. Therefore we find that La Rose did not meet the requirements to become a

class member. Accordingly, it was error for BLM to treat her application as if she were a member of the Fanny Barr class.

Concluding that La Rose was not a member of the Fanny Barr class does not resolve this appeal. Because La Rose was not a member of the Fanny Barr class, she must have had an application pending before the Department on December 18, 1971, or her allotment application cannot be approved, even though BLM agrees that she proved qualifying use and occupancy. BLM argues that La Rose's Native allotment application was not filed until June 1981. In a statement dated May 27, 1994, La Rose admitted that she filed an application for allotment in June 1981. Nonetheless, she has made statements in aid of her appeal that raise a question whether she also filed an application with the Department in 1971.

Native allotment preference rights vest when applicants have filed their applications and completed the required period of qualifying use and occupancy. United States v. Flynn, 53 IBLA 208, 234, 88 I.D. 373, 387 (1981). once the right to an allotment vests, it relates back to initiation of occupancy and takes precedence over competing applications filed prior to the allotment application. See State of Alaska, 129 IBLA 35, 43 (1994) and cases cited therein. Therefore, if La Rose can prove she timely filed her allotment application, her use would take priority over the State selection. Katherine C, (Zimin) Atkins v. BLM, 116 IBLA 305, 315 (1990). If she can show she made a timely application, then BLM could take action to recover the land at issue.

In her May 27, 1994, statement, La Rose recites that she asked her husband for the metes and bounds description of the allotment so she could fill out an application in 1971. She then goes on to say that she "filled out and sent in the mail but apparently got lost or I have no idea what happened to it." It is not clear what "it" was. The "it" might be a Native allotment application or a description of her allotment which the Bureau of Indian Affairs (BIA) was to use to prepare an application for her. La Rose has not asserted that she provided a land description to BIA prior to the statutory deadline, or that she mailed a land description or application to BIA, or signed an application. She does, however, state that in 1971 she was trying to perfect her claim of right to an allotment in Township 31. She admits that the only record BIA could produce was one that indicated she had enquired BIA about her allotment on August 26, 1971; this takes the form of an October 1, 1981, letter from BIA to the Tanana Chiefs Conference that speculates she could have been the "victim of one of BIA's unilateral disapprovals around that period as this is on a piece of earlier State selected land." The letter also states that all potential Fanny Barr files were sent to Alaska Legal Services, and that anything pertaining to her allotment claim would be in those files. The record does not indicate that those files were examined for a record of such a rejection.

Under somewhat similar circumstances, a hearing was required in Heirs of Linda Anelon, 101 IBIA 333, 337 (1988) to determine whether a Native allotment application was pending before the Department on December 18, 1971; an oral hearing is required before a Native allotment application

can be rejected, if there is a material issue of fact regarding the validity of an application. Pence v. Kleppe, 529 F.2d 135, 142 (9th Cir. 1976). La Rose states that she mailed something to BIA in 1971 at a time when she was attempting to perfect an allotment claim, a circumstance corroborated by the record of her inquiry made for that purpose on August 26, 1971. See BIA Letter dated Oct. 1, 1981. It is this sort of question that requires a fact-finding hearing, so that La Rose may be afforded an opportunity to establish whether she made a timely application to BIA. Forest Service USDA (Heirs of Archie Lawrence), 128 IBLA 393, 396 (1994).

Accordingly, we will refer this matter for a hearing. La Rose bears the burden of proving by a preponderance of the evidence produced at hearing that there was a timely filing of her application with the Department on or before December 18, 1971. If it is shown that La Rose filed an application with BIA that was disapproved without notice to her, as suggested in the BIA letter of October 1, 1981, then her application would be considered to have been pending on December 18, 1971, by virtue of the fact that it was rejected without first affording her, as required by Pence v. Kleppe, at 529 F.2d 142, an opportunity for a hearing on a disputed question of fact. Id.

La Rose also asserts that only a portion of the land she has applied for conflicts with the State selection; she argues that the boundary of the allotment could be adjusted to eliminate any conflict. This assertion is incorrect, however. The State selected all available lands in T. 31 N., R. 2 W. of the Seward Meridian in August 1965. The State selection included all of the land in La Rose's application, all of which is located in Township 31, because until she filed her allotment application the land was available for selection by the State. Only if she can show that she had an allotment application pending on December 18, 1971, can she establish any right to the land in Township 31.

Accordingly, we reverse the BLM determination that La Rose was a Fanny Barr class member, set aside the BLM finding that her application was filed in June 1981, and refer the case to the Hearings Division, Office of Hearings and Appeals, for assignment to an Administrative Law Judge. The Judge will hold a hearing on the question of whether Florence La Rose had a Native allotment application pending before the Department on December 18, 1971. Following the hearing, the Administrative Law Judge will issue a decision, which will be appealable to the Board pursuant to 43 CER 4.410. In the absence of an appeal, the decision of the Administrative Law will be final for the Department.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed in part and set aside in part and the case is referred to the Hearings Division.

_____
Franklin D Arness
Administrative Judge

DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS CONCURRING:

I agree that it was error for the Bureau of Land Management (BLM) to treat Florence La Rose as a member of the Fanny Barr class. However, if she were not a member of the Fanny Barr class, she had to have a Native allotment application pending before the Department of the Interior on December 18, 1971, in order to be entitled to an allotment. By this decision we are referring this case to the Hearings Division for a hearing to determine if La Rose had an application pending with the Department on or before December 18, 1971. Although I agree with that result, I do so with some reluctance because I believe a hearing in this case could be a waste of time and resources for all involved. Nevertheless, I am willing to send the case for a hearing out of an abundance of caution in order to protect the rights of the Native.

At the hearing, La Rose bears the burden of proving by a preponderance of the evidence that she filed an application with the Department on or before December 18, 1971. At the present time the only piece of evidence she points to is an October 1, 1981, letter from Charles Bunch, a Bureau of Indian Affairs (BIA) realty officer in Anchorage, Alaska, stating that "she made some type of inquiry about her allotment in Gold Creek on August 26, 1971.

In a letter to La Rose, dated March 11, 1994, following a March 10, 1994, meeting, Alaska Legal Services Corporation (ALSC) attorney Mary Anne Kenworthy explained to La Rose that her file "has some documents in it which indicate that you did not file for your allotment until 1981." 1/ That letter listed and described five documents: (1) a May 1, 1971, letter from La Rose to BIA expressing interest in a "homestead" and wanting to know where land was available; (2) a July 29, 1971, letter from BIA,
Anchorage, to La Rose enclosing a quadrangle map of the Gold Creek area and a status map; (3) an August 26, 1971, letter from BIA, Anchorage, to La Rose "acknowledging your letter regarding Native allotments and enclosing allotment application forms and instruction pamphlet. The letter advises that you should complete the application and posting statement after the corners of the land have been marked;" (4) La Rose's allotment application dated June 1, 1981; and (5) La Rose's letter to the Federal District Court Clerk in Fanny Barr v. United States, Civil No. A76-160(D. Alaska 1982), dated November 14, 1982, "saying that you had applied for a Native allotment at mile 265.5 on the Alaska railroad and that you had used this land since 1966."

The August 26, 1971, letter, from which Kenworthy quoted, appears to be one which BIA prepared in response to La Rose's "inquiry" referred to by

1/ This is apparently a reference to La Rose' file from BIA, which had been transferred to ALSC.

Bunch in his October 1, 1981, letter arid, thus, explains that his reference to "allotment" was not to a pending allotment application, but to a general request by La Rose regarding allotments.

La Rose's letter to the Federal District Court in the Fanny Barr case, dated November 14, 1982, following the filing of her Native allotment application in June 1981, provides the following statement: "I have correspondence from BIA Realty Officer from Juneau regarding this allotment. However, although an application was mentioned I never received one to my knowledge. I filed for this allotment at the BIM in June 1981." (emphasis added).

There is no evidence in the record of any correspondence with La Rose from a BIA Realty Officer in Juneau, Alaska. Copies of correspondence from BIA in the record are from BIA in Anchorage. In fact, Bunch's letter states: "[T]his parcel is clearly within Anchorage's jurisdiction * * *." Regardless of whether she had correspondence from BIA in Juneau or Anchorage, she indicated the correspondence "mentioned" an application (as did the August 26, 1971, BIA letter), but La Rose reported on November 14, 1982, that "I never received one [application] to my knowledge.

Following Kenworthy's listing of documents cited above, she concluded in her letter as follows:

> Unfortunately all of this evidence indicates that your application was not filed until 1981, ten years after the deadline for applications. The only way in which you could prevail would be if there was some evidence or documentation that would show that you filed an application in 1971. I examined all the documents you had concerning your allotment and there was no evidence to show that your application was filed in 1971 but subsequently lost the BIA. [Emphasis in original].

Essentially, what we have in this case is la Rose's present allegation that she sent an application to BIA by mail prior to the deadline and that it "apparently got lost." Even assuming that this statement is true, it alone would not establish that she had an application pending before the Department on or before December 18, 1971. In Heirs of Linda Anelon, 101 IBLA 333 (1988), there were two affidavits in the record attesting to the fact that Linda Anelon filed her original Native allotment application prior to December 18, 1971. We stated on page 337: "We wish to emphasize that affidavits attesting to a timely filing, standing alone, are not sufficient to establish such filing. There must be independent corroborating evidence that the Native allotment application was actually received by a Departmental office on or before December 18, 1971." Nevertheless, we ordered a hearing:

> We conclude that the Himler and Henry Anelon affidavits are sufficient by themselves to raise a question of fact whether Linda Anelon's original Native allotment application was pending before the Department on December 18, 1971. This is because

> accepting the truth of the affidavits, as we must do in determining whether there is a question of fact (Donald Peters, 26 IBLA 235, 241 n.1, 83 I.D. 308, 311 n.1 (1976)), the affidavits state affirmatively that the application had been filed with BIA prior to December 18, 1971. On the other hand, BLM's position is supported by the presumption, which stems from the absence of Linda Anelon's original application from the record, that the application was not filed timely. E.g., David A. Gitlitz, 95 IBLA 221, 224 (1987). In such a situation, there clearly is a factual question whether Linda Anelon's Native allotment application was before the Department on December 18, 1971.

In the Anelon case, the Board required some evidence of filing in order to raise a factual question to justify a hearing. In this case, have no evidence of filing. La Rose has asserted that she filled out an application and placed it in the mail and that it "apparently got lost or I have no idea what happened to it."

However, in June I. Degan (on Reconsideration), 114 IBLA 373 (1990), the Board referred for a hearing the question of whether a Native allotment application had been timely filed on or before December 18, 1971, based on an offer of proof that Degnan timely mailed her application to BIA in the mid-to-latter part of 1970 and that, during that time period, there existed a lack of procedures and resources at BIA to handle the thousands of applications that were received and numerous applications were lost.

Also, in Donald Peter, 107 IBLA 272 (1989), the Board ordered a hearing for a Native allotment applicant who alleged that when he mailed his application to BIA he attached maps for two separate parcels of land; that he subsequently requested by letter that one of the parcels be dropped and a different parcel substituted; and that when BIA forwarded his application to BLM, it failed to include two parcels. The Board stated on pages 276-77 that at the hearing the applicant would be required to establish by a preponderance of the evidence that he prepared and mailed a second description to BIA and that BIA actually received it.

Following the hearing in Peter, the Administrative Law Judge ruled that Peter had failed to satisfy his burden because he did not provide evidence of receipt by BIA of a second description. On appeal, in Donald Peter v. BLM, 135 IBLA 27 (1996), this Board reversed. Examining all the evidence, we concluded that it was "more likely than not that BIA received appellant's second description for Parcel B and then erroneously assumed that it was duplicative of the description for Parcel A" and failed to include it in the application forwarded to BLM. Id. at 37.

The Degnan and Peter decisions provide some precedent for referring a case for hearing in circumstances such as those existing in this case. Accordingly , I agree that La Rose should be provided the opportunity to

prove that she filed a Native allotment application with the Department on or before December 18, 1971. In order to do so, she must establish not only that she mailed a Native allotment application to BIA on or before December 18 1971 but that it was received BIA on or before that date.

_____
Bruce R. Harris
Deputy Chief Administrative Judge